

Rocky Mountain

Administrative History



CHAPTER IV: COLORADO vs. TOLL

While the Robbins case on the control of Park roads was pending in the United States Circuit Court of Appeals in 1920, Colorado's Governor, Oliver H. Shoup, became interested in its possible ramifications. He believed the transportation monopoly had "very grave implications" with respect to the general use of most Colorado highways. All of the state highways connecting the east and west portions of Colorado traversed either Rocky Mountain National Park or forest reservations. The authority of the Secretary of the Agriculture over forest reserves was similar to that of the Secretary of the Interior over park lands for the establishment of "reasonable rules and regulations." Moreover, practically all of the state highways crossed at some point lands still held in federal ownership. [\[1\]](#)

Governor Shoup worried that the federal government might seek exclusive jurisdiction over all the mountain highways in the state. He became so concerned in the matter that he requested the state Attorney-General's office to assist Robbin's lawyers, Lee and Shaw of Fort Collins, before the appellate court. Accordingly, Forest C. Northcutt of that office accompanied attorney Paul Lee to St. Louis and participated in the oral argument before the Circuit Court of Appeals. Northcutt's request to file a brief prepared for the state was, however, denied. [\[2\]](#)

Consequently, Governor Shoup directed his Attorney-General, Victor Keyes, to work with Lee and Shaw in anticipation of a possible state suit against the Park officials to settle the questions involved. By this tactic the state could sue in behalf of itself as proprietor of the roads in question and as representative of all the people of Colorado. But before making a decision to initiate litigation, Governor Shoup called a conference of a few interested parties for July 27, 1922, to discuss the matter. Present at the conference were attorneys Lee and Shaw, Attorney-General Victor Keyes, Park Superintendent Roger Toll and the Governor. Toll carefully noted and recorded what transpired that day. [\[3\]](#)

Apparently only Lee and Shaw strongly favored court action. Keyes, though urging compromise, placed himself at the disposal of Governor Shoup. The Governor, in turn, while harboring no grievance against the Park Service, wished to be "fair" towards the Fort Collins attorneys. In short, if they wanted the state to sue, then the state would do so. Superintendent Toll assured Shoup that the Park Service would support any changes in Park boundaries or Park regulations that Shoup might suggest in order to settle the transportation question definitely. Shoup escaped making a decision by advising Toll to confer with Lee and Shaw. The next day, July 28, Shaw informed Toll that a suit would be the best method

of settling the argument, since any change in Park regulations would be unsatisfactory. He further explained that he was authorized to bring the suit in the name of the state, although the state would bear none of the expenses. Nevertheless, the state would be represented by a member of the Attorney-General's staff. [4]

The case would be brought in the court of Judge J. Foster Symes, who had succeeded Judge Robert E. Lewis as Federal District Judge. Both Keyes and Shaw believed that Judge Symes shared the views of Judge Lewis and would likely decide for the national government. The resolve of the opposition, however, was not weakened by their vision of almost certain defeat. Their plans went beyond the initial legal confrontation. If the state lost in the District Court, Shaw planned to appeal directly to the United States Supreme Court, thus bypassing the Federal Circuit Court of Appeals. [5]

Superintendent Toll assumed that Enos Mills and F. O. Stanley were prodding Lee and Shaw into action. He sensed, however, another reason for Shaw's persistence in the controversy, and explained:

I am inclined to believe that politics is one of the leading considerations in Shaw's action, rather than any unusual activity on the part of Mr. Stanley or Mr. Mills. Mr. Shaw told me that three of the Democratic candidates for Governor had stated that one of their platform planks would be opposition to the Park Service regulation in this Park. It is quite possible that Mr. Shaw, who is Chairman of the State Republican organization, wishes to forestall this action, and it may be that the Governor is also influenced by political considerations. [6]

Whatever the motivating factors, on August 5, 1922, attorneys Lee and Shaw, in the name of the State of Colorado, instituted a suit against Roger W. Toll, questioning the right of the United States to regulate traffic over the roads in Rocky Mountain National Park. Although Toll had acted under the authority of his superiors in the Interior Department, the state thought it unnecessary to make those officers parties in the case. The state was only complaining of the acts committed by Toll under his direct authority within the Park's boundaries. His actions, the state claimed, were neither authorized by the Federal Constitution nor the act creating the Park. [7]

Three weeks later, at the request of the Interior Department, Granby Hillyer, the United States Attorney at Denver appeared for the United States in the case. Further legal assistance came from Roe Emery, owner of the Rocky Mountain Parks Transportation Company. Since neither Toll nor Assistant Park Director Cammerer objected, Emery appointed William V. Hodges of the firm Wilson, Hodges, and Rogers, to represent the transportation company and assist Hillyer. Hillyer's initial move was to file a motion to dismiss the case, first on the grounds that the suit was actually brought against the United States government, and second that the state's complaint was without equity. [8]

Before argument was presented on Hillyer's motion, a decision was reached on the appeal in the Robbins case. The United States Circuit Court of Appeals in St. Louis rendered its

opinion on October 9, 1922, sustaining the previous judgment. The court thus decided for the government on every contention. Assistant Director Cammerer optimistically noted,

the hearing on the 'motion to dismiss,' even if carried to the United States Supreme Court, will not decide the case, but if it comes down to a case going to decide on the merits, I think the Robbins' decision is so sweeping that it will form one of the best arguments for our side of the case. [9]

The hearing on the motion to dismiss the case against Toll, which was held in the District Court in Denver on December 27, 1922, resulted in no decision. While awaiting a new hearing, Hillyer began to question the wisdom of filing another motion to dismiss. He passed along his ideas to Toll on April 5, 1923:

I could wave [sic] a ruling on the motion to dismiss and by answer raise all of the defenses, as well as that of want of jurisdiction, and thus give the Court opportunity at least to pass on all questions involved which might have the effect of better satisfying those who have instigated the bringing of the present suit. [10]

Judge Symes was also told by Hillyer of the possible switch in tactics and he offered no objections.

In fact, nearly everyone connected with the case was dissatisfied with the "motion to dismiss." Lee and Shaw requested that the motion be waived so the case could be heard on its merits. Superintendent Toll urged Cammerer to have the case tried on its merits "unless the Park Service doesn't desire a decision." [11] According to Cammerer, he, Assistant Interior Secretary Pinney, and Secretary of Interior Hubert Work all agreed with Toll. On April 16 Cammerer wired Toll, "It has always been our feeling that the case should be decided on its merits." [12]

Four months later, Toll read in the Rocky Mountain News that the case had been dismissed. [13] To him the turn of events was "somewhat expected," [14] while Cammerer found the situation "rather perplexing." [15] Apparently no one had informed Judge Symes of the desire of Department officials to have the case tried on its merits. The Judge sustained Hillyer's earlier 1922 motion to dismiss on his initiative, even though no new motion to that effect had been made by Hillyer. Judge Symes presumably believed that if the Court did not have jurisdiction, it did not have the right to try the case. [16]

Superintendent Toll evaluated the Park's position in the light of Judge Symes' imaginative decision.

While the determination of the case on its merits would have had some advantages, the present situation is not without other advantages. The delay is more objectionable to Lee and Shaw than it is to the government, and it places a series of obstructions in their path, which may dampen their enthusiasm for litigation. Legal expenses for litigation are probably less

easily obtained since the death of Enos Mills. [17]

Certainly the death of Mills on September 21, 1922, hastened by injuries suffered in a New York subway accident, reduced the strength of the opposition. However, those who had fought for years against the transportation concession appealed Judge Symes' decision to the Supreme Court. They had to wait until May 11, 1925, for an answer, in a decision prepared by Associate Justice, Oliver Wendell Holmes, Jr. Holmes' ruling maintained that the District Court of Colorado had erred when it dismissed the suit against Toll, so the case was remanded to the District Court for trial on its merits. But the Supreme Court considered and ruled on the vital question of jurisdiction. The opinion read in part:

It is said, although it does not appear in the record, that the decision below was based upon *Robbins v. United States*, 284 Fed. Rep. 39, in which these regulations were held to be justified by a cession from the State. But the alleged cession is not in this record and the State denies it in the bill. . . . The State is entitled to try the question and to require the alleged grant to be proved. . . .

There is no attempt to give exclusive jurisdiction to the United States, but on the contrary the rights of the State over the roads are left unaffected in terms. Apart from those terms the State denies the power of Congress to curtail its jurisdiction or rights without an act of cession from it and an acceptance by the national government. . . . The statute establishing the park would not be construed to attempt such a result. [18]

While awaiting the next move by the state, national park officials instructed Toll to investigate state expenditures on the maintenance of park roads. Attorney-General William L. Boatright had heard that the state for some years had done little toward maintaining the roads or exercising supervision over them. If this were true, it might indicate that the State in effect had abandoned the highways to the United States. [19]

After a thorough investigation, Toll found that during 1920 and 1921, the State Highway Commission expended \$68,000 for construction on Fall River Road. From 1919 to 1925 the Commission had spent \$3,500 on maintenance of the road. The total amount expended upon the construction of Fall River Road by the Commission was about \$212,000. This expenditure did not include sums for approach roads to the Park, such as the Big Thompson Canyon Road or the Berthoud Pass Road. [20] According to Toll, the state completed its work on the Fall River Road in 1922, after spending \$14,000 that year for work done north of Grand Lake. [21] Regardless of these expenditures, Toll believed that the state had generally been delinquent in the care of Park roads. He reported:

In general, however, the State has not exercised supervision of the roads, and with the exception noted above, the State has not undertaken the maintenance of the roads in the park. The three counties adjacent to the park all have maintenance crews that maintain roads leading to the park, but, as a general

thing, they stop their maintenance work at the park boundary. [22]

Toll further learned from Casey Rockwell of the Transportation Company, that before 1915 very little work had been done on the roads. After the Park had been created, a regular overseer was appointed for the district and some road work was completed, but certainly not much. [23] Harris Akin, Chairman of the Larimer County Commissioners and a signer of the resolution of August 19, 1919, informed Toll that the Board of County Commissioners relinquished its control over the Park roads to the government "in the belief that it was advantageous for the county to be relieved of the expense of maintaining these mountain roads." [24]

Despite the receipt of this information, George Stephen, the United States Attorney in Denver, thought that the government's position was "not a strong one." Although he agreed to follow Park Service instructions, he urged that a compromise be reached out of court. [25] He reasoned that if the case were decided against the government, the decision would have an unsettling effect upon transportation franchises in other national parks; especially where the state had not ceded jurisdiction.

Despite the dangers inherent in an adverse decision, neither Toll nor Cammerer believed that a compromise would be wise. They were willing to take their chances in court. As Cammerer wrote to Toll,

We have taken our stand and should adhere to it until the question is finally disposed by the court—then we must abide by its decision. [26]

About a month after the Supreme Court ruling in the Toll case, Secretary of Interior Hubert Work presided over a meeting in United States Attorney Stephen's office to consider the Department's course of action. Lee and Shaw, E. O. Brown, E. A. Holmes, Wilson, and Toll attended the meeting. No major decisions were reached then, but presumably everyone got "a clearer idea of the various view points." Toll sent the following impression of the, meeting to Cammerer:

It seems quite probable that Lee and Shaw will permit the case to drag along. I think this is satisfactory to Mr. Stephen as he is not particularly desirous of having the case brought to trial. . . . This tactic would not clear up the question of jurisdiction, but even a decision of the case might not do that. [27]

The next item of available Park correspondence in the suit is dated January 9, 1926, and consists of a telegram from Toll to Cammerer that was as surprising as it was concise: "State of Colorado has dismissed litigation regarding control of roads." [28] In sudden and shocking fashion, the suit, originally brought in 1922 to enjoin Toll from "interfering with the rights of citizens to the use of Colorado state highways" was dropped.

The decision to end the suit of four years standing had been reached in a conference held in Governor Clarence J. Morley's office on January 6. Present besides the Governor were

Senator Laurence Phipps, Colorado Secretary of State Carl S. Milliken, Attorney-General William Boatwright, Deputy Attorney-General Charles Roach, and Attorney Paul Lee. The meeting was called after Congressman William N. Vaile in Washington warned Boatwright by telegram that Colorado would lose the appropriations for the Park unless action was taken immediately to withdraw from its stand on highway matters. On the other hand, dismissing the suit against Toll, the state would receive "at least" \$140,000 in Congressional appropriations for use in maintenance and new road construction in the Park. This inducement had led to the Governor's decision to dismiss the suit. He also decided that he would submit to the next state legislature a bill to cede to the federal government all state highways within the Park. [29]

Having escaped unscathed in this legal battle, Superintendent Toll was, however, soon to become embroiled in a controversy more bitter than anything that had yet confronted his administration. This controversy arose over the question of Colorado's ceding its jurisdiction over roads in the Park to the national government, and will be discussed in the following chapter.

ENDNOTES

1. Lee, "Litigation," in Mills, Rocky Mountain National Park, p. 235.
2. Ibid., p. 236.
3. Letter of Roger W. Toll to Director of National Park Service, July 29, 1922, Colorado vs. Toll correspondence. Rocky Mountain National Park Library.
4. Ibid.
5. Lee, "Litigation," in Mills, Rocky Mountain National Park, p. 237. It was first decided to bring the suit as an original suit in the Supreme Court, but on careful consideration it was thought best to institute it in the Federal District Court for Colorado and then take it by appeal to the Supreme Court in the event of an adverse ruling.
6. Letter of Roger W. Toll to Director of National Park Service, July 29, 1922, Colorado vs. Toll correspondence. Rocky Mountain National Park Library.
7. Lee, "Litigation," in Mills, Rocky Mountain National Park, pp. 237-238.
8. Ibid., p. 238.
9. Letter of Arno B. Cammerer to Roger W. Toll, December 6, 1922, Colorado vs. Toll correspondence. Rocky Mountain National Park Library.

10. Letter of Granby Hillyer to Roger W. Toll, April 5, 1923, Colorado vs. Toll correspondence. Rocky Mountain National Park Library.
11. Letter of Roger W. Toll to Director of National Park Service, April 9, 1923, Colorado vs. Toll correspondence. Rocky Mountain National Park Library.
12. Letter of Arno B. Cammerer to Roger W. Toll, April 16, 1923 Colorado vs. Toll correspondence. Rocky Mountain National Park Library.
13. Letter of Roger W. Toll to Granby Hillyer, August 13, 1923, Colorado vs. Toll correspondence. Rocky Mountain National Park Library.
14. Ibid.
15. Letter of Arno B. Cammerer to Roger W. Toll, August 20, 1923, Colorado vs. Toll correspondence. Rocky Mountain National Park Library.
16. Letter of Granby Hillyer to Roger W. Toll, August 14, 1923, Colorado vs. Toll correspondence. Rocky Mountain National Park Library.
17. Letter of Roger W. Toll to Director of National Park Service, September 10, 1923, Colorado vs. Toll correspondence. Rocky Mountain National Park Library.
18. Colorado vs. Toll correspondence. Rocky Mountain National Park Library.
19. Letter of Attorney-General William L. Boatright to Hubert Work, Secretary of Interior, May 18, 1925, Colorado vs. Toll correspondence. Rocky Mountain National Park Library.
20. Letter of L. D. Blauvelt, State Highway Engineer to Roger W. Toll July 21, 1925, Colorado vs. Toll correspondence. Rocky Mountain National Park Library.
21. Letter of Roger W. Toll to Director of National Park Service, July 24, 1925, Colorado vs. Toll correspondence. Rocky Mountain National Park Library. By contrast, the following appropriations were made by the Federal Government for maintenance and construction of roads in the Park since 1916:

<u>Year</u>	<u>Construction</u>	<u>Maintenance</u>
1916	\$ 3,965	\$ 69
1917	522	79
1918	117	107
1919	249	320
1920	---	834
1921	---	11,900
1922	25,000	11,000

1923	10,000	22,200
1924	---	25,700
1925	15,000	48,671

22. Ibid.

23. Letter of Thomas J. Allen to Roger W. Toll, December 18, 1925, Colorado vs. Toll correspondence. Rocky Mountain National Park Library.

24. Letter of Roger W. Toll to James Grafton Rogers, December 12, 1925, Colorado vs. Toll correspondence. Rocky Mountain National Park Library.

25. Letter of Roger W. Toll to Director of National Park Service, May 30, 1925, Colorado vs. Toll correspondence. Rocky Mountain National Park Library.

26. Letter of Arno B. Cammerer to Roger W. Toll, June 17, 1925, Colorado vs. Toll correspondence. Rocky Mountain National Park Library.

27. Letter of Roger W. Toll to Director of National Park Service, June 23, 1925, Colorado vs. Toll correspondence. Rocky Mountain National Park Library.

28. Telegram of Roger W. Toll to Director of National Park Service, January 9, 1926, Colorado vs. Toll correspondence. Rocky Mountain National Park Library.

29. Estes Park Trail, January 15, 1926. By the time of Morley's action, public interest had largely waned regarding the suit. Nothing was mentioned about the suit in either the Rocky Mountain News or the Denver Post for several weeks prior to January 9.